



November 14, 2001

Mr. John Steiner
Division Chief
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2001-5266

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154859.

The City of Austin (the "city") received a request on July 6, 2001, for "copies of all written correspondence/communications taken by Ms. Renee Scott, Ms. Maria Guerra, and Mr. Wade Mullin during any meetings that were held concerning [Vicky Batson's] termination and complaints of inappropriate behavior by Mr. Mullin." While the city represents that it released the requested information on August 22, 2001, some of the submitted information is responsive to that request. You advise that the submitted records have not been seen by the requestor. In this regard, we note that section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from the public. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

In this case, the city failed to request a decision from this office within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the information responsive to the July 6 request is

presumed to be public information. Gov't Code § 552.302. In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). In this instance, you claim that the requested information is excepted under sections 552.101, 552.103, 552.107, 552.111, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. Rules 503 and 192.5 are compelling reasons to overcome the presumption of openness. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *Id.* Section 552.022 does not apply to any of the documents submitted; therefore, the rules are inapplicable here. Further, sections 552.103, 552.107, and 552.111 do not constitute compelling reasons to overcome the presumption of openness.¹ Thus, the city must release information responsive to the July 6 request. We have marked such information.

The requestor filed a second request, which was received by the city on August 29, 2001, meant to clarify and expand the previous request. This request includes the following categories of information:

1. Copies of notes taken by Maria Guerra on January 26, 2001, in a meeting between Mr. Mullin and Vicky Batson;
2. Copies of notes, e-mails, or other correspondence concerning Ms. Batson's termination;
3. A copy of Sylvia Gonzalez's concerns communicated to Renee Scott regarding Vicky Batson's termination, mentioned in an interoffice memo contained in Ms. Batson's personnel file; and
4. Any information held by Wade Mullin concerning Vicky Batson's job performance.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception), 522 (1989) (discretionary exceptions in general).

You advise that records responsive to the request to which the requestor has previously had access will be made available to her. You further advise that the city has no information responsive to items 1 and 3 of the request. However, the requestor states that she personally witnessed the notes referenced in item 1 being taken. Thus, we are faced with a factual dispute between the city and the requestor regarding whether the city has certain information in its possession. We cannot resolve disputes of fact in the open records process, and therefore, we must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Based on the city's representations, we conclude that it does not have information responsive to item 1 of the request. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Section 552.103 states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong one showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 588 (1991). You have supplied this office with a copy

² Included in the documents is a series of e-mails, which we have marked, that is not responsive to the July 6 or August 27 request, and therefore, the city is not obligated to release that information.

of a complaint of discrimination filed with the Equal Employment Opportunity Commission ("EEOC") by the requestor on February 28, 2001. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Thus, you have shown that litigation was reasonably anticipated on August 29, 2001, the date the city received the request.

Furthermore, having reviewed the submitted information, we conclude that it relates to the anticipated litigation. Therefore, with the exception of the information that we have stated you must release, you may withhold the submitted information under section 552.103. However, we note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold any e-mails originating from or sent to the requestor. In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). As section 552.103 is dispositive, we do not address your other claimed exceptions.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

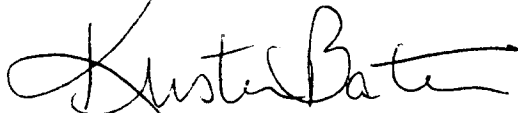
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", with a stylized flourish at the end.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 154859

Enc. Submitted documents

c: Ms. Vicky Batson
504 Whispering Oaks Drive
Burnet, Texas 78611
(w/o enclosures)